Supreme Court, U.S.
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No. 85-1051 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD ROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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App

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Petitioner contends that subpoenas duces tecum issued to 13 corporations and served upon him as custodian of the corporate records should be quashed because the act of producing the records would incriminate him.

1. During the course of an investigation of possible tax evasion and other offenses, a grand jury sitting in the Southern District of New York issued subpoenas duces tecum to 13 corporations, calling for the production of enumerated corporate records. On October 3, 1984, petitioner—who had been linked to the corporations through bank records—was served with the subpoenas through counsel, demanding production of these corporate records. Pet. App. 3a. Petitioner subsequently moved to quash the subpoenas, asserting the Fifth Amendment privilege against self-incrimination. His motion was granted

by the district court, which concluded that, under the circumstances of this case, the production of the records would be incriminatory (*id.* at 5a, 14a-15a).[1]

On the government's appeal, the court of appeals reversed (Pet. App. 1a-12a). The court "relied on the well-established rule that a corporate representative, acting in his or her representative capacity, cannot claim a fifth amendment privilege against the production of corporate documents" (*id.* at 5a-6a). The court of appeals noted that, in contrast to the situation addressed by the Third Circuit in *In re Grand Jury Matter,* 768 F.2d 525 (1985), the subpoenas here were directed to the corporations rather than to a named individual, so that "the government must be satisfied with production by any representative of the corporations" (Pet. App. 7a-8a). The question whether a suitable corporate representative—other than petitioner—could be found to produce the records was left for determination on remand (*id.* at 10a-11a).

2. Petitioner challenges the decision below upholding the subpoenas. Whatever the merits of petitioner's contentions, however, they are not now ripe for review by this Court.[2] The court of appeals' decision places petitioner in exactly the same position that he would have occupied if the district court had not quashed the subpoenas, but had not yet held him in contempt for failure to comply. In these circumstances, the court of appeals' decision is not final, and petitioner should not be permitted to frustrate the

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[1]The order quashing the subpoenas was stayed pending appeal; the district court also ordered that the subpoenaed documents not be moved, transferred or destroyed (Pet. App. 5a, 16a).

[2]It is now more than 16 months since the subpoenas were served on petitioner, and the grand jury still does not have the records it seeks. Interlocutory review at this time would only cause additional delay in the grand jury's investigation.

grand jury any longer. See *United States* v. *Ryan,* 402 U.S. 530 (1971); *Cobbledick* v. *United States,* 309 U.S. 323 (1940). If no other corporate representative is found to produce the subpoenaed records, if petitioner chooses to resist the court of appeals' order, and if the district court holds petitioner in contempt, he will be entitled to present his claims at that time. Accordingly, review by this Court of the court of appeals' decision would be premature.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[3]Because of the interlocutory posture of this case, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court so requests.